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Saripah bte Manap & Ors v Emar Sdn Bhd (In dissolution) & Ors

HIGH COURT (MELAKA) — CIVIL SUIT NO 22-17 OF 1995
SURIYADI J
16 JULY 1997

B

Civil Procedure *— Accounts — Action for — Company under receivership — Application by directors for documents of company and accounts of monies received by receivers and managers — Whether documents requested were property of the company — Whether receivers and managers could refuse to hand over documents to the directors — Rules of the High Court 1980 O 43 r 1 — Contracts Act 1950 s 166 — Companies Act 1965 s 190*

C

Civil Procedure *— Pleadings — Striking out writ and statement of claim — Application for — Company under receivership — Application by directors for accounts of money received by receivers and managers as agent of company — Whether a hopeless or unsustainable case — Rules of the High Court 1980 O 18 r 19*

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Companies and Corporations *— Receivership — Action for accounts — Application by directors to be supplied accounts of monies received — Whether documents requested were property of the company — Whether receivers and managers could refuse to hand over documents to the directors — Whether directors entitled to the accounts — Whether claim barred by virtue of s 190 of the Companies Act 1965 — Contracts Act 1950 s 166*

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The third plaintiff, a company ('the company'), which was involved in the development of a housing estate, obtained financial assistance from Perwira Habib Bank Bhd ('the bank') to develop the housing estate and provided securities in the form of debentures. The company ran into financial difficulties and on 15 June 1987, Messrs Coopers & Lybrand were appointed receivers and managers. The first and second plaintiffs were the current directors of the company. The first and second plaintiffs wrote to the bank with the intention of finding out the current position of the company's accounts but received no response. In a letter dated 13 May 1993, the plaintiffs wrote to the receivers and managers seeking, inter alia: (i) a copy of a working paper and all attachments thereto presented to the bank in 1986 in support of the company's application for a standby overdraft and bank guarantee facilities ('the first set of documents requested'); and (ii) a certified true copy of the profit and loss statement and balance sheet of the company for the past three years ('the second set of documents requested') but again received no reply. The plaintiffs thus initiated legal action seeking, inter alia, that all monies received by the receivers and managers as agents for the company be paid to the company and that accounts of the same under O 43 r 1 of the Rules of the High Court 1980 ('the RHC') be supplied to the plaintiffs.

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According to the second and third plaintiffs, they sought the accounts to ensure that their residual duties as directors as provided under ss 167–169 of the Companies Act 1965 could be carried out. It was also argued that the application was in tandem with the

obligations of the receivers and managers under s 166 of the Contracts Act 1950. The defendants filed an application ('encl 46') pursuant to O 18 r 19 of the RHC to strike out the plaintiff's claim and contended that the plaintiffs were not entitled to any accounts over and above that provided by s 190 of the Companies Act 1965. The senior assistant registrar ('the SAR') allowed encl 46 and struck out the claim. The plaintiff appealed to the judge in chambers. The issues were whether the documents requested were indeed the property of the company and whether the receivers and managers could in any event refuse to hand over the documents to the plaintiff.

Held, allowing the appeal:

The first set of documents requested was undeniably prepared by the company in 1986 and later sent to the bank for the purposes of the affairs of the company created for the debenture holder. At the material time, the receivers were not even in the picture and the first set of documents was the property of the company. Similarly, the second set of documents requested related to the affairs of the company which was of no concern to the debenture holder and could not be construed as documents prepared by the defendants for the purposes of enforcing the rights of the debentures. On this premise, the documents were identifiable to be the property of the company. At this stage, the standard of proof was not the balance of probabilities but whether it was triable that the documents were owned by the company (see p 333A–C).

Moreover, the supply of both sets of documents was within the provision of s 166 of the Contracts Act 1950 and within the purview of the equitable and contractual duties of the receivers and managers as agents. Also, there was nothing in s 190 of the Companies Act 1965 to indicate that the documents ought not to be supplied to the plaintiffs even if the request was over and above the statutory account to be supplied to the Registrar of Companies. Further, the documents requested would not prejudice the interest of the debenture holders and were required by the plaintiff in order to comply with their statutory obligations to render accounts (see p 336E–F); *Gomba Holdings UK Ltd & Ors v Minories Finance Ltd & Ors* [1989] 1 All ER 261 followed.

Therefore, in this case, the principle that however difficult the case may appear to be, if unsustainable, it must be struck out with impunity did not apply. This was not a hopeless or unsustainable case and the order of the SAR was set aside (see p 336G–H).

[Bahasa Malaysia summary

Plaintif ketiga, sebuah syarikat ('syarikat tersebut'), yang terlibat dalam pembangunan sebuah kawasan perumahan, telah memperolehi bantuan kewangan daripada Perwira Habib Bank Bhd ('bank tersebut') untuk memajukan kawasan perumahan dan telah menyediakan cagaran dalam berbentuk debentur. Syarikat tersebut mengalami masalah kewangan dan pada 15 Jun 1987, Tetuan Coopers

A & Lybrand dilantik sebagai penerima dan pengurus. Plaintif-plaintif pertama dan kedua merupakan pengarah semasa syarikat tersebut. Plaintif-plaintif pertama dan kedua telah menulis kepada bank tersebut dengan hasrat mendapat maklumat tentang kedudukan semasa akaun syarikat tersebut tetapi tidak menerima apa-apa jawapan. Dalam sepucuk surat bertarikh 13 Mei 1993, plaintif-plaintif menulis kepada B penerima dan pengurus dan meminta, antara lain: (i) sesalinan kertas kerja dan semua lampiran bersamanya yang dikemukakan kepada bank tersebut pada tahun 1986 yang menyokong permohonan syarikat tersebut untuk overdraf tunggu sedia dan kemudahan gerenti bank ('set dokumen pertama yang diminta'); dan (ii) sesalinan pernyataan C keuntungan dan kerugian yang diakui sah dan kunci kira-kira syarikat tersebut untuk tiga tahun yang lalu ('set dokumen kedua yang diminta') tetapi sekali lagi tidak menerima apa-apa jawapan. Justeru itu, plaintif-plaintif memulakan tindakan undang-undang memohon, antara lain, bahawa semua wang yang diterima oleh penerima dan pengurus sebagai ejen-ejen syarikat tersebut dibayar kepada syarikat D tersebut dan bahawa akaun-akaun yang sama di bawah A 43 k 1 Kaedah-Kaedah Mahkamah Tinggi ('KMT') dibekalkan kepada plaintif-plaintif.

Menurut plaintif-plaintif pertama dan kedua, mereka meminta akaun-akaun itu bagi memastikan bahawa kewajipan baki mereka E sebagai pengarah seperti yang diperuntukkan oleh ss 167–169 Akta Syarikat 1965 boleh dijalankan. Ia juga dihujahkan bahawa permohonan adalah sejajar dengan obligasi penerima dan pengurus di bawah s 166 Akta Kontrak 1950. Defendan-defendan memfailkan permohonan ('lampiran 46') menurut A 18 k 19 KMT untuk membatalkan tuntutan plaintif dan menghujahkan bahawa plaintif- F plaintif tidak berhak mendapat apa-apa akaun selain daripada apa yang diperuntukkan oleh s 190 Akta Syarikat 1965. Penolong kanan pendaftar ('PKP') membenarkan lampiran 46 dan membatalkan tuntutan itu. Plaintif merayu kepada hakim dalam kamar. Isu-isu adalah sama ada dokumen-dokumen yang diminta benar-benar adalah G harta syarikat tersebut dan sama ada dalam apa keadaan pun penerima dan pengurus boleh enggan menyerah dokumen-dokumen kepada plaintif.

Diputuskan, membenarkan rayuan:

H Set dokumen pertama yang diminta telah disediakan oleh syarikat tersebut pada tahun 1986 dan kemudiannya dihantar kepada bank tersebut untuk tujuan hal ehwal syarikat tersebut yang dibuat untuk pemegang debentur. Pada masa yang material, penerima tidak pun terlibat dan set dokumen pertama yang diminta adalah harta syarikat tersebut. Dalam cara yang sama, set dokumen kedua yang diminta I adalah berkaitan dengan hal ehwal syarikat tersebut yang bukan urusan pemegang debentur dan tidak boleh ditafsirkan sebagai dokumen-dokumen yang disediakan oleh defendan-defendan untuk tujuan menguatkuasakan hak debentur. Berdasarkan ini, dokumen-dokumen boleh dikenal pasti sebagai harta syarikat tersebut. Di tahap ini, darjah membukti bukanlah imbangan kebarangkalian tetapi

sama ada ia boleh dibicarakan bahawa dokumen-dokumen adalah kepunyaan syarikat tersebut (lihat ms 333A–C). A

Tambahan pula, pembekalan kedua set dokumen adalah dalam lingkungan peruntukan s 166 Akta Kontrak 1950 dan dalam skop kewajipan ekuiti dan kontraktual penerima dan pengurus sebagai ejen. Juga, tiada apa-apa dalam s 190 Akta Syarikat 1965 untuk menandakan bahawa dokumen-dokumen tidak harus dibekalkan kepada plaintif-plaintif sekalipun permintaan adalah selain daripada akaun statutori untuk dibekalkan kepada Pendaftar Syarikat. Selanjutnya, dokumen-dokumen yang diminta tidak akan memudaratkan kepentingan pemegang debentur dan dikehendaki oleh plaintif bagi mematuhi obligasi mereka untuk memberikan akaun-akaun (lihat ms 336E–F); *Gomba Holdings UK Ltd & Ors v Minories Finance Ltd & Ors* [1989] 1 All ER 261 diikut. B C

Maka, dalam kes ini, prinsip bahawa walau bagaimana sukarnya kes, andainya ia tidak boleh kekal, ia mesti dibatalkan bebas daripada hukuman tidak terpakai. Ini bukan merupakan kes yang tiada harapan atau tidak boleh kekal dan perintah PKP diketepikan (lihat ms 336G–H).] D

Notes

For cases on accounts, see of 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 11–27. E

For cases on striking out writ and statement of claim, see of 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2754–2765.

For cases on receivership, see of 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 366–416. F

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)

American Express International Banking Corp v Hurley [1985] 3 All ER 564 (refd) G

B Johnson & Co (Builders) Ltd, Re [1955] 1 Ch 634 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)

Evans v Bartlam [1937] 2 All ER 646 (refd)

Gomba Holdings UK Ltd & Ors v Homan & Anor [1986] 3 All ER 94 (refd) H

Gomba Holdings UK Ltd & Ors v Minories Finance Ltd & Ors [1989] 1 All ER 261 (folld)

Gosling v Gaskell & Grocott [1897] AC 575 (refd)

Jamir Hassan v Kang Min [1992] 2 MLJ 46 (refd)

Majlis Perbandaran Melaka Bandaraya Bersejarah v Chin Nyok Lin, Pentadbir Harta Pesaka Loke Yoon Hing @ Loke Yoon Heng, Si mati & Ors [1996] 2 AMR 2138 (refd) I

Newhart Developments Ltd v Co-operative Commercial Bank Ltd [1978] 1 QB 814 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Official Receiver v Chi Man Kwong & Ors [1994] 1 SLR 809 (refd)
Oh Thevesa v Sia Hok Chai [1992] 1 MLJ 215 (refd)
Peck v Russel (1923) 4 FMSLR 32 (refd)
Smiths Ltd v Middleton [1979] 3 All ER 842 (refd)
Standard Chartered Bank Ltd v Walker & Anor [1982] 3 All ER 938 (refd)
Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v Coffral (M) Sdn Bhd [1992] 1 MLJ 553 (refd)
Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 (refd)
Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)
United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In liquidation) & Anor [1986] 1 MLJ 75 (refd)
Zakaria bin Mohamed Esa v Dato Abdul Aziz bin Ahmad & Ors [1985] 2 MLJ 222 (refd)

Legislation referred to

Companies Act 1965 ss 167, 168, 169, 190
Contracts Act 1950 s 166
Rules of the High Court 1980 O 18 r 19, r 19(1)(a), O 33 r 2, O 43 r 1, O 56 r 1

CC Aiyathurai (*CC Aiyathurai & Co*) for the plaintiffs.
Vinayaga Raj Rajaratnam (*Skrine & Co*) for the defendants.

Cur Adv Vult

Suriyadi J: The first and the second plaintiffs are the current directors of Emar Sdn Bhd, the third plaintiff. The third plaintiff — which is involved in the development of a housing estate known as Taman Maju Jasin — had obtained financial assistance from Perwira Habib Bank Bhd. Securities in the form of debentures were also given. Due to some financial problems, the defendants were appointed as receivers and managers on 15 June 1987 ('the defendants' or just 'the receiver'), managing the business of the company from the date of their appointment. The plaintiffs later wrote to the bank with the intention of finding out the current position of the company's account but unfortunately received no response. To cut the matter short, the plaintiffs initiated this litigation, praying inter alia that money received by the defendants as agents of Emar Sdn Bhd be paid to the latter and that accounts be supplied to the plaintiffs.

On 4 April 1997, the senior assistant registrar ('the SAR') heard encl 46, a summons-in-chambers application by the defendants for an order under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). The application strove to strike out the plaintiffs' writ of summons and amended statement of claim on the grounds that they:

(a) disclosed no reasonable cause of action; and/or

(b) were scandalous, frivolous and/or vexatious; and/or

(c) an abuse of the process of the court.

Having heard the submissions of both parties, the SAR allowed the application and struck off the writ of summons and the amended statement of claim. The plaintiffs have now come before me to appeal against that decision. This appeal has come by the conduit of O 56 r 1 of the RHC whereby an appeal shall lie to a judge in chambers from any judgment, order or decision of the registrar. Since this decision emanated from the SAR, the appeal therefore is an actual rehearing and I have to treat it as if I am hearing it for the first time. I will not be fettered or shackled by the views of the SAR. As Lord Atkin in *Evans v Bartlam* [1937] 2 All ER 646 said at pp 648–649:

> I wish to state my conviction that, where there is a discretionary jurisdiction given to the court or a judge, the judge in chambers is in no way fettered by the previous exercise of the master's discretion. His own discretion is intended by the rules to determine the parties' rights, and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it.

(See also *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 and *Majlis Perbandaran Melaka Bandaraya Bersejarah v Chin Nyok Lin, Pentadbir Harta Pesaka Loke Yoon Hing @ Loke Yoon Heng, Si mati & Ors* [1996] 2 AMR 2138).

With that platform in mind, I now proceed with the rehearing of encls 2 and 53. A first sight will show that aside from the file being thick, even though still at the early stages, the numbering of the enclosure is rather erratic and far apart. Had I not been privy to the history of this case, I certainly would have been intimidated by these unusual factors. The records will show that my involvement began with the hearing of encl 18 on 19 March 1996 when the defendants prayed that the plaintiffs' action be dismissed with costs. At the end of the hearing, I made the necessary orders. In the afternoon when I was about to proceed to hear another application — ie encl 3 which was the plaintiffs' application under O 43 r 1 — both parties by consent agreed that encl 4 be converted as a statement of claim and the defendants be at liberty to file a defence within two weeks. By consent too, the order I made in the morning pertaining to encl 18 was vacated.

It would appear from the records that the statement of claim had also gone through the process of reamendment with the defence having been filed.

In the case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, the Supreme Court in crystalline terms said that as the defendants had filed their unconditional appearance, they had thus deprived themselves of the right to invoke O 18 r 19. In fact, a hearing date was also given, ie 2 June 1997 though vacated by virtue of the striking out application. After having gone through the rigmarole of repeated amendments — and at such a late stage at that — the defendants

A now struck with a vengeance again by attempting to strike out this converted statement of claim vide encl 46. Even though a court has a discretion to allow the application at the close of pleadings, however it will probably refuse to exercise such discretion where the matter has already been set down for trial (*Jamir Hassan v Kang Min* [1992] 2 MLJ 46 and *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* B [1994] 2 MLJ 83). There was nothing to stop them from taking up another recourse, ie pursuant to O 33 r 2 of the RHC. In the current case, not only has unconditional appearance been filed but this application is also not an O 33 r 2 application.

As said above, the SAR initially heard it, and allowed the application. C Being dissatisfied with the outcome, the plaintiffs have now come before me. Midway during the hearing, both parties indicated that this matter could be resolved by the court merely by deciding on certain relevant issues. Mr Aiyathurai appeared to be quite content for purposes of deciding whether the application should be resolved to hinge merely on the spartan D issue of whether the plaintiffs are entitled to the accounts as particularized in the writ. The defendants, on the other hand, indicated that they would be quite happy if the whole action could be resolved on the issue of whether the plaintiffs were entitled to accounts over and above those dictated under s 190 of the Companies Act 1965. Regardless of the dissimilarities of the approach, both parties were in agreement that the E whole issue in the writ hinged on accounts.

When the hearing of the appeal began, the defendants launched a salvo alleging that the plaintiffs had no leg to stand as no affidavit in reply was filed. He relied on *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 to support his argument. The plaintiffs in return ventilated to F the court that the wordings of O 18 r 19(1)(a) brook no requirement of affidavits in reply as the provision reads that 'no evidence shall be admissible on an application under paragraph (1)(a)'. I will not disagree with the plaintiffs on these points. Furthermore, he canvassed that the facts elicited from the converted statement of claim were more than sufficient for the court's consideration (see *Zakaria bin Mohamed Esa v Dato Abdul Aziz Bin* G *Ahmad & Ors* [1985] 2 MLJ 222 and *Peck v Russel* (1923) 4 FMSLR 32).

On the point of law, after disposing of the above issue, Mr Aiyathurai further contended that the fluidity and the uncertainty surrounding the law pertaining to the duties of the receiver especially in relation to s 190 was sufficient ground for the application to be dismissed. This section reads:

H

> (1) Every receiver or manager of the property of a company or of the property within Malaysia of any other corporation shall —
>
> (a) within one month after the expiration of the period of six months from the date of his appointment and of every subsequent period of six months and within one month after he ceases to act as I receiver or manager, lodge with the Registrar a detailed account in the prescribed form showing —
>
> (i) his receipts and his payments during each period of six months, ...
>
> (ii) the aggregate amount of those receipts and payments during all preceding periods since his appointment; and

(iii) where he has been appointed pursuant to the powers contained in any instrument, the amount owing under that instrument at the time of his appointment, in the case of the first account, ...

I find the argument of Mr Aiyathurai to be very attractive as en route to my decision, these following questions consistently troubled and nagged me, namely:

(a) what was the extent of the receiver's responsibility to the plaintiffs;

(b) what kind of information may the plaintiffs request for purposes of carrying out their residual duties as directors without facing rejection;

(c) must the plaintiffs merely apply to the Registrar of Companies for the relevant accounts instead of extricating them from the receiver (see *Standard Chartered Bank Ltd v Walker & Anor* [1982] 3 All ER 938; *Smiths Ltd v Middleton* [1979] 3 All ER 842; *Halsbury's Laws* (4th Ed) para 938);

(d) what is the legal value of the accounts if obtained from the Registrar of Companies when the latter is not the maker of the document;

(e) even if these documents were public documents with the contents being acceptable in a court of law, would the contents be sufficient to cover the needs of the plaintiffs;

(f) why was s 190 of the Companies Act 1965 the point of reference by the defendants when that provision is silent as to the level of responsibility or the relevant provision as regards the request of the plaintiffs;

(g) were the accounts requested over and above the accounts mentioned in s 190 of the Companies Act 1965; and

(h) even if the accounts requested for were over and above the accounts mentioned in s 190 of the Companies Act 1965, for the purposes of this case, was the receiver right in refusing the plaintiffs' request?

In fact, all these issues above are intertwined with legal questions that merit some serious consideration on my part. A summary procedure under O 18 r 19(1)(a) and (b) should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. If it can be shown that the pleadings do disclose some cause of action or has raised some questions fit to be decided, however slight the chances are of succeeding, that case should not be struck off. Otherwise, it should be set down for argument as required under O 33 r 2 of the RHC (see *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36).

The request for the accounts

The accounts requested for come under O 43 r 1 of the RHC and this rule reads:

(1) Where a writ is indorsed with a claim for an account or a claim which necessarily involves taking an account, the plaintiff may, at any time after the defendant has entered an appearance or after the time limited for appearing, apply for an order under this rule.

A (2) An application under this rule must be made by summons and, if the Court so directs, must be supported by affidavit or other evidence.

(3) On the hearing of the application, the Court may, unless satisfied by the defendant by affidavit or otherwise that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either
B party be paid to him within a time specified in the order.

The plaintiffs' counsel, in support of his case, began with s 166 of the Contracts Act 1950 solely to press the point home that an agent is bound to render proper accounts to his principal on demand. He canvassed that the receiver in this case is the agent of the company and as such must
C comply with the plaintiffs' request. This legal assertion holds true, as a receiver and manager is normally constituted as the agent of the company before liquidation (see *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In liquidation) & Anor* [1986] 1 MLJ 75 at p 78 and *Gosling v Gaskell & Grocott* [1897] AC 575). Even
D though that is true, nevertheless due to his complex position created by the debenture, the primary duty of the receiver is to the debenture holders and not the company (*Re B Johnson & Co (Builders) Ltd* [1955] 1 Ch 634). His actions must be based on good faith as to act otherwise may even render him liable for a suit under negligence (see *American Express International Banking Corp v Hurley* [1985] 3 All ER 564 and *Official Receiver v Chi Man*
E *Kwong & Ors* [1994] 1 SLR 809).

The defendants had been harping before me that their responsibility to the request to the plaintiffs was only limited to the documents already handed to the Registrar of Companies as required under s 190. The defendants had interpreted the law in that way regardless of the agency
F capacity and regardless of the fact that the receiver is in possession of the plaintiffs' property. The issue of the ownership of the property plays a very important role in their submission, and the case heavily relied on is that of *Gomba Holdings UK Ltd & Ors v Homan & Anor* [1986] 3 All ER 94. It would appear that the defendants have interpreted the attitude of Hoffmann J to be that the law imposes no duty on a receiver of a company
G to provide any account to the company over and above that already given to the Registrar of Companies. In *Gomba Holdings UK Ltd & Ors v Minories Finance Ltd & Ors* [1989] 1 All ER 261, as regards the issue of ownership, Fox LJ said (at pp 263–264):

> ... what are the records of the companies, ie whether a document belongs to
H the companies or someone else.
>
> The receivers in the present case plainly had a duty to manage the affairs of the companies. All documents which were created or received in pursuance of that duty must be the property of the companies. ...
>
> ... the receivers had to advise and inform the debenture holders regarding
I the conduct of the receivership. Documents created for that purpose, while they can certainly be said to relate to the affairs of the companies, cannot be the property of the companies. They were not brought into being for the purpose of the companies' business or affairs ... .
>
> Thirdly, there are documents prepared by, or on behalf of, the receivers not in pursuance of any duty to prepare them but simply to enable the receivers to

prepare such documents or perform such duties as they were required to prepare or perform for the purposes of their professional duties to the debenture holders or the companies. Such papers are, I think, the property of the receivers.

I am persuaded by the logic of the above reasoning as regards ownership. For easy reference, I now reproduce the letter.

c/o No 15 Jalan AU 3/14
Ampang Ulu Klang
54200 Selangor Darul Ehsan

13 May 1993

The Manager
M/s Coopers & Lybrand
165A & 167A Jalan Munshi Abdullah
75100 Melaka

Dear Sir

Re: Emar Sdn Bhd

The above is the company which developed Taman Maju in Jasin, Melaka and subsequently placed under your receivership and management, and we are the present directors of the company.

We have been given to understand that you are in possession of a copy of the working paper that was presented to Perwira Habib Bank Malaysia Bhd in late 1986 in support of the company's application for standby overdraft and bank guarantee facilities. Based on the working paper, a standby overdraft of RM450,000 and a banker's guarantee of RM1.7m were granted by the bank on or about 22 January 1987, following which the first debenture was signed by the company favouring the bank.

Further to the above, we believe it is part and parcel of your duties as receivers and managers to prepare the accounts and financial statements of Emar Sdn Bhd. And as the company managers, you are under obligation to supply the company as represented by its directors a copy each of its profit and loss statement and balance sheet on an annual basis. We regret that this has not been done for many years.

We would therefore be pleased if you could now forward to us the following:

(a) a copy of the said working paper to the bank, together with all attachments thereto; and

(b) a certified true copy each of the profit and loss statement and balance sheet of Emar Sdn Bhd for the last three years, together with all the notes to the accounts.

As we require the above urgently, we would appreciate if you could forward them to us within 10 days from the date of this letter.

We sincerely hope we do not have to resort to legal means to obtain those documents.

Thank you.

Yours sincerely

.....

A Perusing the first set of documents which were requested, it is undeniable that they were prepared by the company in 1986 and later sent to Perwira Habib Bank Bhd for purposes of the affairs of the company created for the debenture holders. At that material time, the receiver was not even in the picture yet and as such I rule them to be the property of the company. Similarly, the second set of documents relate to affairs of the company B which is no concern of the debenture holder. They cannot also be construed as documents prepared and owned by the receiver for purposes of enforcing the rights of the debentures. On this premise, these documents too are identifiable to be the property of the company. At this stage, the standard of proof is not of balance of probability but whether it is triable that the C documents are owned by the company. If I may add further, no extra effort is required to prepare these documents and it certainly does not in any way impede the duties of the receiver in his duties towards the debenture holders. In fact by so supplying these documents, not only assistance is rendered to the plaintiffs in the fulfilment of their statutory duties, but also in tandem with the obligations of the receiver as provided under s 166 of D the Contracts Act 1950. At the earlier stage, the directors had already indicated the purpose of wanting the accounts — ie to ensure that their residual duties could be carried out as provided comprehensively by ss 167, 168 and 169 of the Companies Act 1965. Any default on their part will attract some form of prosecution, and if found guilty, may be liable to E imprisonment up to six months or fine of RM5,000 or both. These documents therefore are highly essential, if not imperative, for the plaintiffs' peace of mind and duties and hence justified in requesting for them.

At any rate if the defendant is not in possession of all these documents, he need only say so, instead of playing a legal hide and seek game with the F plaintiffs and in the process creating problems all around.

The next relevant question is: Can the defendants refuse to hand over the requested documents which I already have ruled to be the property of the company? To answer this question, I propose to have a sojourn of legal cases, simultaneously being conscious of and alert to the complex separate and distinct duties of the directors and the receiver.

G In the case of *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] 1 QB 814 where the court discussed the issues of debentures, receivers and the authority of directors, Shaw LJ at p 819E said:

> But the provisions in the debenture trust deed giving him that power is an enabling provision ... . *It does not divest the directors of the company of their* H *power, as the governing body of the company*, of instituting proceedings in a situation where so doing does not in any way impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are subject to the charge.

Wan Yahya J in *Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v* I *Coffral (M) Sdn Bhd* [1992] 1 MLJ 553 at pp 558–559 as regards the same issue said:

> The appointment of a debenture holder receiver even with authority to act as agent of the company does not operate to terminate the director's control

> of service with the company unless such appointment of receiver is inconsistent with the continued employment of a managing director — see *Griffiths v Secretary of State for Social Services* [1973] 3 All ER 1184. In *Newhart Developments Ltd v Co-operative Commercial Banks Ltd* [1978] 1 QB 814, it was held that a provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring such an action, and did not divest the company's directors of their power ... provided that the proceedings did not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperilling the assets.

In *Smiths Ltd v Middleton* [1979] 3 All ER 842 at p 847, Blackett-Ord VC said:

> During the receivership, the keeping of accounts obviously requires co-operation between the company and the receiver, because although the *directors* are still, I think, liable technically under s 147 of the 1948 Act [Companies Act 1948] and its successor [s 12 of the Companies Act 1976], clearly they *may have to get the necessary information from the receiver.* (Emphasis added.)

O'Donovan *Company Receivers and Managers* (2nd Ed) at p 2823 succinctly said:

> Although the board's powers are truncated by the appointment of a receiver and manager the directors are not exempted from their statutory obligations while the company is in receivership. They are often, therefore, in a invidious position since they might not be able to obtain ready access to the company's books and financial statements so as to be able to perform their duties.

The defendants have submitted that so long as they have supplied the plaintiffs with the documents earlier transmitted to the Registrar of Companies they would thus have complied with the plaintiffs' request. The plaintiffs have asserted otherwise. It is a fact that a company is paralysed by the presence of a receiver, with complete control of all the important documents and unless there is cooperation, the plaintiffs will be put in an unpleasant position. Here, for certain, cooperation is lacking.

The defendants have resorted to the case of *Gomba Holdings UK Ltd & Ors v Homan & Anor* [1986] 3 All ER 94 to deny the request of the plaintiffs to support their assertion that no duty is owed to the plaintiffs except to supply the documents which they had sent earlier to the Registrar of Companies pursuant to their statutory duties. This argument must also mean that the defendants' lack of duties extend even to the documents which I have already ruled to be the property of the company. The usage and interpretation of *Gomba*'s case per the judgment of Hoffmann J by the defendants have perplexed me as after having scrutinized the case comprehensively, I have grave doubts that this case supports the latter's contention.

To substantiate my stance, I begin by deciphering s 190 of the Companies Act 1965. Having gone through it, I found nothing which indicates that the amount of information to be supplied to the plaintiffs is only in so much of that already given to the Registrar of Companies. Similarly, there is nothing provided under this section to say that by virtue

A of these accounts having been sent to the Registrar of Companies, and in the event documents are requested, the defendants may reject that request on the basis that that responsibility towards the plaintiffs has been exhausted. As to whether Hoffmann J has dealt with this matter, the answer is in the negative as he has left the matter still wide open. In his refusal to agree to
B any suggestion that the documents given to the Registrar of Companies are about all that the plaintiffs can ask for, Hoffmann J at p 99 said:

> During the receivership, the company's right to information beyond the statutory accounts must in my judgment depend on demonstrating a 'need to know' for the purpose of enabling the board to exercise its residual rights or perform its duties. I do not want to explore the question of what this
C might entail further than is necessary for the purposes of this case.

Even though his Lordship has said that he did not wish to explore the all-imperative question of whether the company is entitled to information which is beyond the statutory accounts, his remarks have hinted at a path by which I may capitalize and be guided. At p 97, the judge said:

D

> Section 498 imposes no duty on a receiver of a company's property appointed under a fixed charge to provide any account to the company and *it seems unlikely that the obligation to send accounts to the registrar of companies was intended to supplant the receiver's accountability to the mortgagor.* (Emphasis added.)

E Further down at the same page, his Lordship made a rather interesting observation when he did not discount the duties of the receiver under the doctrine of equity. He opined:

> This provision in my judgment is intended to leave unaffected any obligation on a receiver to account or provide information which may exist in equity or
F by contract.

At p 98, his Lordship accentuated the above observation by saying:

> I have already indicated that for the purpose of determining the extent of a receiver's equitable obligation to provide accounts and information to the company, his status as agent provides as starting point for the inquiry rather
G than its solution.

Aside from the above observations, Hoffmann J had also not discounted the instance when the directors 'may need information from the receivers in order to comply with its statutory obligation to render accounts' (p 99). Confirmable with the principles he enunciated, he viewed that the receiver's
H duty to provide such information must be subordinated to his primary duty not to do anything which may prejudice the interest of the debenture holder.

To add to this point, I would like to highlight the view of Blackett-Ord VC where at p 847 of *Smiths Ltd v Middleton*, he candidly said:

I

> I appreciate he is not managing the business strictly for the company, but he is the receiver of the property of the company, and the practicalities are that he is largely running the company on the directors' behalf, and it may, not necessarily will, be practically impossible for the directors to keep within their technical obligations without his assistance. He has a statutory obligation

> to produce these yearly abstracts of receipts and payments, and these in a long receivership can be complementary to the annual accounts of a company. *But the documents required under s 372 are only abstracts, and that must mean, I think, that there are fuller accounts in the background. There would be accounts which the receiver, as the company's agent, is bound to keep and to produce to the company when required.* (Emphasis added.)

Having perused the documents requested by the plaintiffs, I found for a fact that:

(i) the first set of documents requested is the property of the company prepared before the coming of the receiver;

(ii) the second set of documents may also be documents which are owned by the company. I have deliberately used the word 'may' as at this stage there is no legal requirement that the document on a balance of probability is owned by the company. For the purposes of this application, it is sufficient if the factor of ownership is disputable. If the second set of document does not exist, the receiver need only say so and the matter will end there;

(iii) the supply of these documents will in no way prejudice the interest of the debenture holders;

(iv) these documents are required by the plaintiffs in order to comply with their statutory obligation to render accounts;

(v) the act of supplying the documents is certainly within the provision of s 166 of the Contracts Act 1950, and within the purview of the equitable duties and contractual obligations of the receiver as agents; and

(vi) there is nothing in s 190 to indicate that documents ought not to be supplied to the plaintiffs even if the request is over and above those statutory accounts supplied to the Registrar of Companies.

I have gone into some detail on the issue and may even have encroached into the merits of the statement of claim, but due to the peculiar nature of this case, this course of action is necessary. The defendants have consistently stressed the point that however difficult the case may appear, if unsustainable it should be struck off with impunity. I am in total agreement with this salutary principle but having perused the unusual primary facts, meshed with legal niceties (facts which I must assume to be true), this principle certainly does not apply in this application. I find that this is not one of those hopeless or unsustainable cases but rather the opposite and consequently have no hesitation in setting aside the order of the SAR with costs. I therefore order that the writ and the amended statement of claim be set down for trial.

Order accordingly.

Reported by Lew Chee Seong